Financial Data and Technology Association

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VIA ELECTRONIC SUBMISSION

September 21, 2021

The Honorable Stephen F. Lynch
Chairman
Task Force on Financial Technology
House Financial Services Committee
2129 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Warren Davidson
Ranking Member
Task Force on Financial Technology
House Financial Services Committee
4340 O'Neill House Office Building
Washington, D.C. 20024

Dear Chairman Lynch and Ranking Member Davidson:

The Financial Data and Technology Association of North America ("FDATA North America") appreciates this opportunity to submit a letter for the record for the House Financial Services Committee's Task Force on Financial Technology's hearing "Preserving the Right of Consumers to Access Personal Financial Data." As the leading trade association representing financial data aggregation firms and financial technology platforms that provide enhanced consumer financial access and inclusion, FDATA North America and its member companies strongly believe and advocate for a financial ecosystem in which the end user has complete utility of their financial data.

About FDATA North America

FDATA North America was founded in early 2018 by several firms whose technology-based products and services allow consumers and SMBs to improve their financial wellbeing. We count innovative leaders such as the Alliance for Innovative Regulation, API Metrics, Basis Theory, Betterment, BillGo, Codat, Direct ID, Equitable Bank, Envestnet Yodlee, Experian, Fiserv, Flinks, Interac, Inverite, Intuit, Kabbage, Mogo, Morningstar, M Science, MX, Petal, Plaid, Questrade, Rocket Mortgage, Salt Edge, Trustly, ValidiFI, VoPay, Wealthica, Xero, and others among our members. We are a regional chapter of FDATA Global, which was the driving force for Open Banking in the United Kingdom, and which continues to provide technical and policy expertise to policymakers and to regulatory bodies internationally that are contemplating, designing, and implementing open finance frameworks. With chapters in North America, Europe, Australia, South America, and India, FDATA Global has established itself as an expert in the design, implementation, and governance of open finance standards and frameworks globally since its inception in 2013.

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FDATA North America's members include firms with a variety of different business models. Many provide technology services to large financial institutions or partner with financial institutions to enable innovation and expand financial access and inclusion. Others offer their own customer-facing financial products or services that may, for example, expand access to low-interest credit for thin or no-file borrowers, provide a gateway to automated savings or investments, onboard SMBs to accept and make digital payments, or support the SMB community by enabling technology-powered advisory and accounting services. Collectively, our members enable tens of millions of American consumers and SMB customers to access vital financial services and products, either on their own or through partnerships with financial institutions. Regardless of their business model, each FDATA North America member's product or service shares one fundamental and foundational requisite: it depends on the ability of a customer to actively permission access to some component of their own financial data that is held by a financial institution.

The Need for CFPB Rulemaking Under Section 1033 of the Dodd-Frank Act

FDATA North America has, since its inception, encouraged the Consumer Financial Protection Bureau ("CFPB" or "the Bureau") to utilize the authority vested in it under Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act") to promulgate, by rule, a consumer financial data right that will spur greater financial services innovation and competition and improve consumer financial access and inclusion. We have been encouraged by two important developments to this end in recent months: the issuance of an advance notice of proposed rulemaking ("ANPR") by the Bureau pertaining to consumer access to financial records late last year and, more recently, inclusion in President Biden's July 2021 Executive Order on Promoting Competition in the American Economy language that encourages the CFPB to consider "commencing or continuing a rulemaking under section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products."

The drumbeat towards the promulgation by the CFPB of a rulemaking under Section 1033 of the Dodd-Frank Act comes at a critical moment. Countries around the world are quickly embracing the notion that the customer should be in control of their own financial data. By contrast, the unlevel playing field that currently exists for consumers and small- and medium-sized businesses ("SMBs") in the United States in this regard represents both a failure to American consumers and SMBs as well as a global competitive disadvantage. This unlevel playing field has, to date, been dictated by opaque bilateral data access agreements between their financial institution and aggregation firms that enumerate what choices they have to utilize their own financial data and the protections they are afforded when they do so.

This problematic reality endures because, unlike a growing list of other large economies across the globe, there exists no distinct assertion of a customer's legal right to access themselves, or permission access to, their financial data in the United States. Although Section 1033 of the Dodd-Frank Act establishes a direct financial data access right for consumers, unless that data right includes authorized data access to third parties chosen by the consumer, it will provide inadequate access to critical financial products and services. The status quo, under which financial institutions continuously exercise control over their customers' data, provides little benefit to the consumer or SMB. Financial institutions have historically used this control to determine whether and how their customers may utilize third-party financial services providers, including outright blocking the ability of their customers to do so. While, in some cases, financial institution throttling or blocking of third-party tools may be positioned as being based on security or regulatory compliance postures, competitive concerns unquestionably have fueled some of this behavior as well. In these instances, the end user typically is unaware as to why the product or service they are trying to use – or even have depended on for their financial wellbeing in the past – is not functioning or supported. This artificially stifles both consumer choice and marketplace competition.

Additionally, FDATA North America sees competition in data-driven financial services stifled by financial institutions that override customer direction to authorize sharing of their financial data. These restrictions include broad, as well as specific, attempts to directly limit third parties' access to data despite customer authorization; degradation of data sharing that effectively thwarts customer-directed access to financial data; and self-imposed mandatory reauthentication requirements and targeted blocking of sharing specific data fields in ways that effectively disable competing services. A recent FDATA North America study determined that more than 650 million existing consumer and small and mid-size accounts held by tens of millions of customers in the United States could be rendered useless by industry-led initiatives to move to APIs at just the largest 25 financial institutions.[1] These institutions do not supply sufficient data to fuel existing use cases upon which customers depend to manage their financial wellbeing. In each of these cases, competition in data-driven financial services would be substantially inhibited, to the direct and severe detriment of consumers. Recent investments by the largest financial institutions in the U.S. in a commercial entity that seeks to grant greater control to data holders regarding whether and how they will abide by their customers' instructions to grant access to their financial data have further eroded faith in the third-party provider marketplace that industry alone can deliver the outcome envisioned by Section 1033 of the Dodd-Frank Act.

Aside from competitive concerns, the logistics of providing customer-permissioned data access have become a significant blocker to a more vibrant marketplace. A growing number of large

[1] Please refer to Appendix A.

U.S. financial institutions are requiring third parties to negotiate and execute bilateral data access agreements if they desire to establish customer-permissioned data connectivity. While these bilateral agreements are intended to provide critical governance in banks' transitions from existing data-gathering technologies to the use of APIs, and have been encouraged based on recent supervisory guidance by the Office of the Comptroller of the Currency ("OCC")[2], market participants generally recognize that individually negotiated bilateral agreements are an inefficient means over the long term of dealing with customer-permissioned data access. Such agreements lack uniformity, transparency, and insight, which can be challenging and expensive for third-party partners. These agreements result in differences between direct access and authorized access to desired tools by consumers based on the institution with which they have banking relationships and the aggregator that provides the services to the desired tool.

Several FDATA North America member organizations that have executed data access agreements with large financial institutions report that the negotiations can take as long as three years to execute and often require extensive legal costs. Smaller financial institutions will not bear such costs and are thus discouraged from adopting new technology and user services. Additionally, the technology lift and technical resources required to develop independent APIs is a disincentive to smaller financial institutions that desire to allow their customers to permission access to products and services that they do not offer. An ongoing dependence on bilateral data access agreements therefore presents a significant challenge to smaller financial institutions that will struggle to keep pace with larger banks nationwide regarding API integration due to the substantial expense of negotiating bespoke agreements with any third party wishing to connect to that API.

Any fair assessment of the ecosystem must also conclude that, in the absence of a legally binding mandate to make customer data available with that customer's consent, commercial interests can factor into decisions that financial institutions make regarding what data to include in their APIs or how onerous the terms of third-party bilateral agreements will be. One of the principal rationales for government-led open finance regimes is the fact that holders of a customer's financial data, who themselves have a commercial interest in retaining that data to offer their customer additional financial products or services, have a competitive disincentive to make that data available because they use it offer their customer additional financial products or services.

Principles for Ensuring Consumer and SMB Financial Data Access

The CFPB has, through its Section 1033 authority, the opportunity to significantly level the playing field for consumers and SMBs, expand financial access and inclusion, improve

[2] "Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29." March 5, 2020. https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html.

competition in the financial services marketplace and, on a global level, ensure that the United States' financial services system remains competitive internationally. To accomplish these critically important objectives, FDATA North America has recommended to the Bureau that it utilize its Section 1033 authority to issue a rule that adheres to six key principles:

1. **The CFPB should create a legal customer financial data right**. FDATA North America strongly believes that any non-proprietary data element that is available to a consumer or SMB through their online banking portal or is included on a paper statement, and that is not the intellectual property of the data holder, should be considered in scope as the Bureau contemplates promulgating a customer financial data right under Section 1033 of the Dodd-Frank Act.

2. **The Bureau should define and clearly enumerate the limited circumstances in which custodians of financial data may override customer consent.** The Bureau should prescribe a well-defined set of circumstances under which financial institutions may withhold or restrict access to a customer's data access right to avoid a suppression of customer choice, voice, and consent. These circumstances should be limited to instances in which a data access request poses an imminent security risk or a situation in which the financial institution, the aggregator, and the customer each reasonably understands why the holder of the data determined that it was not in the consumer's or SMB's best interest to share the data due to evidence that the entity to which the customer permissioned access to their data posed a clear risk to the customer's financial wellbeing. Importantly, defining the circumstances under which a data holder may restrict data access would prohibit financial institutions from limiting their customers' ability to access their financial data for any other reason.

3. **The CFPB should directly supervise financial data aggregation firms.** The best way to address financial institutions' concerns regarding third-party supervision issues associated with financial data access, and to remove the need for onerous bilateral data access agreements, is for the Bureau to create a federal supervisory regime for data aggregation platforms. Such a supervisory regime should establish a principles-based baseline for data, cyber, and information security practices as well as governance over aggregation firms. Importantly, direct supervision of data aggregation platforms would also enable the CFPB to exert third-party partner supervisory standards for aggregators' fintech clients.

4. **The Bureau should coordinate with the prudential regulators on Regulation E modernization.** Regulation E was first promulgated to address financial institutions' liability to their customers when ATMs became commonplace in the 1970s. Innovation in

the financial services ecosystem has outpaced a liability framework that never could have envisioned an environment in which customers could permission access to their financial data electronically to third parties in real time. To ensure liability is appropriately allocated throughout the financial ecosystem, FDATA North America advocates for a modernization of Regulation E that stipulates that the entity responsible for customer loss of funds related to a data breach or fraud be responsible for making that customer whole based on custody and responsibility.

5. **The CFPB must recognize the need to permit current and legacy technology.** While FDATA North America is technology neutral and supports the transition to application programming interface ("API") access of customer-permissioned financial data, it is important to acknowledge the reality that the financial ecosystem is not yet ready to completely prohibit existing technological methods of accessing customer data without massive detriments to consumer and SMB financial health. In the absence of a fully developed, robust API environment, direct access, sometimes also referred to as "screen scraping" of the consumer interface, is a necessary tool to enable consumer and SMB data access, particularly for customers of all but the largest U.S. financial institutions. In Europe, the transition to its modernized second payment services directive ("PSD2"), which supported full consumer utility over their financial data, recognized the benefits of API access but embraced screen scraping as a fallback option in the event that APIs were not readily accessible for covered data fields. This approach has the benefit of providing an incentive for banks to build robust APIs more quickly; poorly designed and implemented APIs that are deployed into the market will simply not be fit for purpose.

6. **A strong federal data privacy regime would benefit consumers and SMBs.** While the Bureau is not granted under Section 1033 of the Dodd-Frank Act the authority to promulgate a national data privacy regime, FDATA North America and its members offer that such a framework would be additive to consumer and SMB protection and would better align the United States with other jurisdictions, including Europe, that have implemented national or supranational data privacy requirements.

The combination of these six principles would provide consumers and SMBs with safe, secure access to their financial data and, by extension, to critically important financial applications and tools that can meaningfully improve their financial wellbeing.

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Conclusion

FDATA North America appreciates the attention to this critically important issue by the Task Force on Financial Technology. Every financial technology tool, regardless of its specific use case, depends on the ability of its customer, whether they are a consumer or SMB, to grant access to components of their financial data in order to provide the benefit of their product or service. Accordingly, limitations, restrictions, or outright blocking of financial data access to consumers and SMBs threatens the ability of financial technology tools to support their customers' financial wellbeing and stifles innovation in the financial services marketplace.

As the CFPB works to promulgate a proposed rule under Section 1033 of the Dodd-Frank Act, we hope that the Task Force on Financial Technology will continue to examine this vitally important space and encourage the Bureau to use its statutory authority to create a customer-centric, safe and secure open finance system in the United States.

Thank you once again for holding today's hearing.

Sincerely,

Steven Boms
Executive Director
FDATA North America

Enclosure

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Appendix A: Missing API Data Fields and End User Impact[3] [4]

Financial Institution Size, By Total Assets	*Impacted Use Cases*	*Total Number of End User Accounts Impacted*
Top 10	Consumer Personal Financial Management, Account Verification, Lending, Small Business; Money Management, Money Movement, Wealth Management, Retirement Savings, Tax, Bookkeeping, Loan Underwriting, Fraud	557,395,494
11-25	Consumer Personal Financial Management, Lending, Small Business, Money Movement, Wealth Management, Retirement Savings, Tax, Bookkeeping, Loan Underwriting, Fraud	103,572,965

[3] As of December 1, 2020.

[4] Because some of the largest 25 U.S. financial institutions have not yet implemented an API, data is extrapolated to reflect the total impact to end users if those APIs, once established, mirror those that have already been deployed by other large financial institutions.